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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-236

MICHAEL BUDZANOSKI and JOHN SEDDON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAEL BUDZANOSKI and JOHN SEDDON, Petitioners, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in this case on June 12, 1972, wherein the Court affirmed the decision of the United States District Court for the Western District of Pennsylvania denying Petitioners' Joint Motions for Arrest of Judgment, Judgment of Acquittal and New Trial.

QUESTIONS PRESENTED

1. Whether a statute, constituting the "willful" entry of false information in union records a crime punishable by imprisonment and/or fine and the disability to hold union office for a period of five years from the date of completion of sentence, necessitates that the word "willful" be defined as requiring an evil motive or bad purpose.

2. Where conviction for willfully making a false entry in a union record automatically entails a self-executing and nondiscretionary disability to hold union office or serve as a labor relations consultant for a period of five years from the date of completion of sentence, is not the trial court required to so advise the jury prior to their deliberations?

3. Where Defendants are indicted for violation of 29 U.S.C. §439(c) does not the action of the trial court in admitting testimony that Defendants' actions were intended to illegally divert union funds to a political campaign, which actions would constitute a separate and independent crime, violate Defendants' rights under the Fifth Amendment to the United States Constitution to be tried only on charges presented in an indictment returned by a Grand Jury?

4.A. Where Government trial counsel prepare and submit to the Court and opposing counsel a trial memorandum containing an admission which requires the acquittal of Defendants, is not said memorandum admissible in evidence?

4.B. Where, in the course of its opening charge to the jury a trial court defines the word "willfully", as

used in a criminal statute, in a particular manner, and defense counsel present their cases and arguments to the jury in reliance thereon, does not the trial court's action in altering that definition in its final charge to the jury constitute a deprivation of the right to effective assistance of counsel in derogation of the Defendants' Fifth Amendment rights?

5.A. Does not the introduction of inculpatory hearsay evidence in a criminal trial constitute fundamental injustice in disregard of the prohibitions of the Supreme Court against such procedures?

5.B. Does not the introduction of inculpatory hearsay evidence, attributed to an alleged co-conspirator at a time after the alleged conspiracy had ended and not in furtherance of the conspiracy, violate the prohibitions enunciated by the Supreme Court against such procedure?

5.C. Where a trial court permits highly prejudicial testimony during the Government's case in rebuttal, which if relevant to the issues on trial should have been properly offered in the case in chief, and if not relevant to the issues on trial constitutes a prohibited attempt to impeach on collateral matters, does not the action of the trial court constitute a departure from accepted and usual judicial procedure and a gross abuse of discretion by the trial court in derogation of Defendants' Fifth Amendment rights?

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania denying Petitioners' Motion for Discovery (Appendix A, *infra*, pp. 1-6a), was entered December 10, 1970 but does not appear to be reported. The Opinion of the District Court denying Petitioners' Motion to Dismiss the Indictment (Appendix B, *infra*, pp. 7-12a), was entered on February 18, 1971, and is reported at 322 F. Supp. 1064. The Order of the District Court denying Petitioners' Motion for Arrest of Judgment, Judgment of Acquittal and New Trial (Appendix C, *infra*, pp. 13-23a), was entered on August 20, 1971, and is reported at 331 F. Supp. 1201. The Opinion of the United States Court of Appeals for the Third Circuit (Appendix D, *infra*, pp. 24-46a), is reported at .... F.2d ...., and was filed on June 12, 1972.

JURISDICTION

The judgment of the Court of Appeals (Appendix E, *infra*, p. 47a), was entered on June 12, 1972. By order of Justice William J. Brennan, Jr., dated July 3, 1972, the time for filing this Petition was extended to and including August 11, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the District Court was by virtue of 29 U.S.C. § 439(c) and 18 U.S.C. § 371.

STATUTES INVOLVED

The statutory provisions involved are: Section 209(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 439(c):

> Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this sub-chapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.,

and 18 U.S.C. § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF THE CASE

Defendants, MICHAEL BUDZANOSKI and JOHN SEDDON, were convicted in a jury trial in the United States District Court for the Western District of Pennsylvania on three Counts of willfully making, or causing to be made, false entries in the books, records and reports of District No. 5, United Mine Workers of America, in violation of Section 209(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 439(c), and one Count of conspiracy to violate this Act in violation of 18 U.S.C. § 371. Defendants filed joint Motions for Arrest of Judgment, Judgment of Acquittal and New Trial. The Motions were denied by the District Court. (Appendix C, *infra*). The Judgment of the District Court was affirmed by the United States Court of Appeals for the Third Circuit. (Appendix D, *infra*). Petitioners seek review of the Opinion and Judgment of the United States Court of Appeals for the Third Circuit.

Factual Background

On March 4, 1969, Marion Pellegrini, an unindicted alleged co-conspirator and a member of the Executive Board of District No. 5, United Mine Workers of America, presented a voucher for $1,870 to John Seddon, Secretary-Treasurer of District No. 5. The voucher (Gov't Ex. 9, Ap. pp. 154-55a),[1] requested reimbursement for

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1. The designation "Ap. p. . . . . a" refers to the Appendix of the record prepared for the Court of Appeals. A copy of said Appendix is being certified to this Court concurrently with the filing of this Petition, by written request to the Clerk of the Court of Appeals.

expenses incurred in preventing the spread of wildcat strikes in Pellegrini's sub-district.

Subsequently, Peter Halvonik, another unindicted alleged co-conspirator and also a member of the Executive Board of District No. 5, United Mine Workers of America, presented a similar voucher in the amount of $2,370 to John Seddon. (Gov't Ex. 8, Ap. p. 153a). Both vouchers were honored. The checks were subsequently cashed and the monies returned to John Seddon who retained custody of the monies until all of the monies were redeposited to the Union checking account in July of 1969.

As a regular aspect of the internal auditing procedures of District No. 5, John Seddon's secretary prepares a monthly financial summary of the District's finances. The monthly financial report of March, 1969 (Gov't Ex. 10, Ap. pp. 157-58a), indicated that the checks issued to Pellegrini and Halvonik were expenditures for organizing expenses.

The indictment returned against Petitioners was limited to accusations of willfully making and causing to be made false entries in the books, records and reports of District No. 5. Despite this, however, the Government attempted to prove that the submission of vouchers by Pellegrini and Halvonik and the entries in the March financial report were intended to obtain Union funds for use in the re-election campaign of W. A. Tony Boyle for President of the International Union, United Mine Workers of America.

Petitioners did not deny that the vouchers submitted by Pellegrini and Halvonik were in fact not

factually accurate. Petitioners emphatically denied, however, that the use of the vouchers was in any way intended to divert Union funds into a political campaign. Rather, Petitioners testified that the vouchers were designed solely to convert Union funds to cash prior to the beginning of an organizing campaign in the northern mine fields of District No. 5. The District had conducted several prior campaigns in attempts to organize this area and the practice, in the past, had been for the Union representatives in the field to advance their own funds for necessary organizing expenses and await reimbursement. This practice was unsatisfactory due to the long delay in being reimbursed because of the financial position of the District. These circumstances resulted in the idea that the organizing funds should be obtained in the form of cash prior to the beginning of the organizing campaign and provided to the representatives for use in the payment of organizing expenses. Marion Pellegrini first initiated the idea that this should be done by submitting vouchers purporting to be for expenses incurred, cashing the check issued thereon and placing the cash in the custody of John Seddon.

Inculpatory Hearsay and Improper Rebuttal

Francis McCallister, another unindicted alleged coconspirator, was called and testified as a defense witness. During cross examination by Government counsel, on totally collateral matters not charged in the indictment, McCallister was asked and answered as follows: (Ap. pp. 980a-982a)

Q. Now, Mr. McCallister, who did you support in the 1969 election for International President?

A. The Board.

Q. Did you ever pledge your support to any other candidate at any other time?

A. No, sir.

Q. Were you ever asked by Mr. Yablonski to support him?

A. Yes.

Q. Isn't it a fact that you met with Mr. Yablonski and his brother, Leon Yablonski, at the Howard Johnson Restaurant?

A. Yes, sir.

Q. Isn't it a fact that was just a few days after he announced?

A. Yes, sir.

Q. Didn't he ask you to support him at that time?

A. Yes, he did.

Q. Didn't you say that you support him at that time?

A. I did not.

Q. Isn't it a fact, Mr. McCallister, that you admitted to Mr. — to both the Yablonski brothers that Mr. Budzanoski had attempted to take money out of the union funds to support Boyle's campaign?

A. No, sir.

Q. Isn't it a fact that when Mr. Yablonski confronted you with these facts, that you admitted they were true, and told him that that was a true story?

A. I did not.

Q. You did not say that?

A. I did not.

Q. But you do recall the meeting at the Howard Johnson Motel and Restaurant at New Stanton?

A. Yes, sir.

Mr. Henderson: That is all the questions we have.

After the defense had rested, the Government proposed to have Leon Yablonski testify and, upon a request for an offer, the following occurred: (Ap. p. 1385a)

LEON YABLONSKI, being called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Mr. Simmons: Your Honor, we would like to have an offer please.

The Court: Counsel, the defense would like an offer.

(Whereupon, the following side bar conference was held out of the hearing of the Jury.)

Mr. Gorey: Mr. Yablonski will testify to a meeting he had on May 31, 1969, with Francis McCallister at New Stanton. At that time, he was in the presence of his brother, Jock. Mr. — The two Mr. Yablonski's and Mr. McCallister had a conversation.

Mr. Jock Yablonski questioned Mr. McCallister about this voucher business, the scheme to divert funds from the miner organization into the Boyle campaign, and Mr. McCallister made statements concerning this claim.

Mr. Simmons: We think it's collateral, Your Honor.

The Court: Not collateral. He is named as a co-conspirator, Mr. McCallister.

Mr. Simmons: He is not indicted, though.

The Court: Well, that — He is permitted to do it.

Thereupon, over defense objections regarding attack on collateral matters and admission of hearsay, Leon Yablonski was asked by Government counsel and answered as follows: (Ap. pp. 1390a-1393a)

By Mr. Gorey:

Q. Would you tell the Court and Jury what that conversation was?

A. Francis McCallister said, "Well, it looks like it is going to be a long, hot summer." And Jock agreed with him, and asked Frenchy, "What are you going to do?" And Frenchy said, "Well, Jock, you didn't have to ask me that question. I'm going along with you all the way."

And Jock at that particular time left him know that he had knowledge or information of the fact that there was a large sum of money put aside for Tony Boyle's campaign. Frenchy's reply to that was that, "Well, Jock, I knew you would eventually find out about it." Jock said to him, "Well, do you want to tell me about it?"

So Frenchy said that in February of that year, there was a Board meeting in Pittsburgh, at which time Mike Budzanoski reminded the Board that Tony Boyle was going to have an election that year, and that he felt that they had an obligation to Tony Boyle and to see that he was re-elected. He said that

he had a plan to raise some money to further this campaign and promote, and he said that what he wanted to do was to get the Board Members to submit vouchers in the amount of the area of $2,000 apiece, stating in these vouchers that this money was being used to prohibit the extension of the strike, the black lung strike that was occurring in West Virginia at that time, and that he requested that they submit those vouchers to the Secretary-Treasurer, and the Secretary would issue checks in the amount of the vouchers, and that they were to cash these checks. They would set this money aside.

My brother asked Frenchy at that time, "How much money—

Mr. Simmons: Your Honor, we object to the testimony from the deceased. I don't see how it would be possible to ever call him or cross examine him on what statements that are made—

The Court: We are not admitting this for the truth of the statement, but merely for the fact that Mr. Jock Yablonski said it. You can cross examine him from here to kingdom come on that.

Go ahead, Mr. Yablonski.

The Witness: Jock asked Frenchy how much money had been put aside, and Frenchy said that the amount was around $10,000.

I asked Frenchy how much his check was for, and he said it was around $2,000. I asked him who he gave the money, returned the money to, whether he gave it to Mike or whether he gave it to Johnny

Seddon, and he said, "No, I gave it to Johnny Seddon."

That was about the extent of our conversations regarding—

By Mr. Gorey:

Q. Did Mr. McCallister ever explain to you and your brother at that meeting whether Mr. Budzanoski in February had related that he had been to Washington and had a conversation with President Boyle?

The Court: You cannot lead the witness that way, Counsellor.

Mr. Simmons: Your Honor, that noise outside, I couldn't hear over that.

The Court: It is just as well, because I have said it was an improper question.

The Jury will ignore the question, please.

The Witness: Well, during the—

The Court: No, I have stricken the question. There is nothing before you now.

By Mr. Gorey:

Q. Do you recall anything else that was said that day?

A. Yes, Frenchy related that during the Board meeting, that Mike had told them that he had discussed his plan with Tony Boyle, and Tony Boyle had given him his approval.

Jock told Frenchy, he said, "Frenchy, you should never have got involved in that type of a

situation." And Frenchy shrugged his shoulders and said, "I had no alternative. And Jock, you know how the organization is run. You just don't tell the boss, 'No', and get away with it."

And that was the extent of that.

Mr. Gorey: No further questions.

Leon Yablonski was the last witness to testify in the trial of the case, the Government not offering his testimony in its case in chief but, rather, as rebuttal.

Trial Memorandum

At the start of the trial, Government counsel submitted to the Court and served on Petitioners' counsel a trial memorandum. (Court Ex. 2). The memorandum explicitly stated that the various financial transactions described above did not involve the disbursement of funds. Despite counsel for Petitioners' repeated offer and objections, the Court refused to admit the trial memorandum in evidence.

Definition of Willfullness

Inasmuch as Petitioners were charged with the criminal act of "willfully" making a false entry in Union books, records or reports, the definition of willfully was of crucial importance to the case. At the beginning of the case, the District Court, in the course of its preliminary charge to the jury, made the following statement:

In the final charge, I will define the terms for you such as "willful" which merely means on purpose, intentionally. *Willfully means with a bad purpose.*

I will define them more fully at the close of the case. I am merely giving this to you now so you know what the charge is and what the burden of proof is and who has it. (Ap. p. 65a, emphasis added)

Prior to the Court's final charge, Petitioners presented Requests for Instructions to the Court. (Ap. pp. 1594-1603a). Petitioners' fourth request read as follows:

4. You are instructed that the word willful as used in this statute means an act done with a bad purpose, or without justifiable excuse, or stubbornly, obstinately or perversely and is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by careless disregard whether or not one has the right to so act.

U.S. v. Murdock, 290 U.S. 389

U.S. v. Haggerty, 419 F.2d 1003 (7th Cir. 1969).

The District Court refused to instruct the jury as requested. The Court stated: "I will define the word 'willful' in my own terms, so I will not give this; but I will define the term." (Ap. p. 1434a)

On the following day, during the course of summation to the jury, attorney Simmons was interrupted by the Court in the course of his argument regarding "willfulness" as follows:

Now, I would like to draw your attention to something which I think is very important in this case. I think you have heard that one of the issues in this case is what the word "willful" means. And I am going to turn to page 11 of the record, and

quote the Honorable Court on what the Court said to you early in this case, what the term "willful" was. And the Honorable Court said this —

The Court: Mr. Simmons, I would rather you do not do that. I am going to charge on willfulness in my charge.

Mr. Simmons: Are you going to charge the same way here, sir, that you charged here?

The Court: No.

Mr. Simmons: Sir, we plead surprise, and ask for a mistrial, if you're going to charge differently than the way you told me you were going to charge, Your Honor.

The Court: Proceed.

Mr. Simmons: Well, I am going to have to tell you what I think "willful" is. I don't know what the Judge is going to tell you, because I don't know what he is going to say.

But, in order for it to be willful, in contemplation of criminal law, you have to have a bad heart and bad motives. (Ap. pp. 1552-53a)

On the day following counsels' summations to the jury, the Court charged the jury on the definition of "willfulness" as follows:

Now, you must understand what is meant by "knowingly" and "willfully", because it is charged the acts were done knowingly and willfully.

An act is done knowingly, if done voluntarily and intentionally, and not because of an accident or

other innocent reason. You see, you cannot commit a crime merely by accident. You must do this knowingly; that is, voluntarily and intentionally, and not by merely mistake or accident.

As to willfulness, an act is done willfully, if done knowingly and with reckless disregard of the law. Although bad purpose would satisfy the definition of willfulness, the defendant need not necessarily have acted with evil or bad purpose, or even be aware that his acts are in violation of the law, to have acted willfully.

In other words, to have acted willfully, the defendant or defendants would have to have been conscious of the fact that what he or they were doing was contrary to law, or would have had to have been acting wholly in disregard of what the law may provide. In other words, you do not have to know it was in violation of law, if you are acting wholly in disregard of what the law may provide, and in pursuit of a course, without making a reasonable effort to determine whether the plan pursued was contrary to law. (Ap. p. 1619a).

* * * * * * *

Again, the term "willfully", and this is the gist of what you must decide, means to act knowingly and intentionally, and with reckless disregard of the law, that is, of the provisions of this law. (Ap. p. 1632a).

Shortly thereafter, the Judge reversed his earlier decision and read Petitioners' fourth request for charge to the jury stating that in essence that is the way the Court had previously charged as to "willfulness". (Ap. p. 1653a).

The jury returned a verdict of guilty against the Petitioners on all Counts. Defendants filed their Motions for Arrest of Judgment, Judgment of Acquittal and New Trial, which Motions were denied. The Third Circuit Court of Appeals affirmed the Judgment of the District Court. This Petition followed.

REASONS FOR GRANTING THE WRIT

1. This Court should grant a writ of certiorari to the United States Court of Appeals for the Third Circuit for the reasons that that Court's definition of willfulness is both in conflict with decisions of other Courts of Appeal and raises an important question of Federal law which has not been, but should be, settled by this Court.

In *U.S. v. Haggerty,* 419 F.2d 1003 (7th Cir., 1969), *cert. denied* 397 U.S. 1064 (1970) the Seventh Circuit in defining the term "willfully" as used in 29 U.S.C. § 439 (c) stated:

> We conclude, however, in the light of the purpose of the statute, that a *deliberate purpose to conceal,* by an entry on the union records, the disbursement of union funds for a purpose not yet authorized by the union is sufficient for a finding of willfulness.
>
> 419 F.2d at 1008 (emphasis added)

In *U.S. v. Spingola,* .... F.2d ...., 80 LRRM 2875 (7th Cir., June 12, 1972), the Seventh Circuit in defining "willfully" as used in subsections (a) and (d) of the same statute held that a negligent failure to file a required report on time does not constitute a willful failure to file.

In the case at bar, the Third Circuit Court of Appeals has affirmed a District Court charge which taken as a whole is inconsistent both internally and with the decisions of the Seventh Circuit cited above. Thus, in defining "willfully", the District Court stated:

> to have acted willfully, the defendant or defendants would have to have been conscious of the fact that what he or they were doing was contrary to law,

> or would have had to have been acting wholly in disregard of what the law may provide. In other words, you do not have to know it was in violation of law, if you are acting wholly in disregard of what the law may provide, and in pursuit of a course, without making a reasonable effort to determine whether the plan pursued was contrary to law. If a defendant or either of them knew or should have known that the acts were likely to be illegal, under the circumstances, that is enough to require a reasonable effort to be undertaken to determine whether or not in fact the acts were illegal.
>
> (Ap. pp. 1619-1620a).

This charge permits Petitioners to be convicted for negligently having permitted others to prepare and submit false vouchers into union records and/or negligently failing to note the proscriptions of the statute, and constitutes a serious conflict with the rulings of the Seventh Circuit Court of Appeals.

The varied and inconsistent definitions of willful charged by the District Court and affirmed by the Court of Appeals is also in conflict with the *Haggerty* decision. Thus, the District Court originally instructed the jury that "willfully" meant with a bad purpose (Ap. p. 65a). In its final charge, the Court instructed the jury that "willfully" meant "knowingly" and "with reckless disregard of the law." (Ap. pp. 1619-20a). "Although bad purpose would satisfy the definition of willfulness, the Defendant need not necessarily have acted with evil or bad purpose, or even be aware that his acts were in violation of the law to have acted willfully" (p. 1619a). The Court further charged that the Defendants would

"have to have been conscious of the fact that what he or they were doing was contrary to the law, or would have had to have been acting wholly in disregard of what the law may provide" (p. 1619a). The Court continued by saying "willfulness" does not require evil intent or a bad heart (p. 1620a). The second definition is inconsistent with the first in that it specifies that bad purpose is not necessary.

Later in its charge, the Court defined "willfully" as acting "knowingly and intentionally, and with reckless disregard of the law, that is, of provisions of the law" (p. 1632a). In this definition the Court eliminated that aspect of the definition given at p. 1619a, which included in the definition of willfully acting with consciousness of the fact that what he or they were doing was contrary to the law.

At p. 1654a, the Court reversed its earlier ruling and read to the jury Defendants' fourth request for charge. The Court charged that the word "willful" as used in the statute, "means an act done with a bad purpose, or without justifiable excuse, or stubbornly, obstinately or perversely, and is also employed to characterize a thing done without grounds for believing it is lawful, or conduct marked by careless disregard whether or not one has the right to so act." The Court further indicated that it believed that point was consistent with the way it had previously charged as to willfulness. The latter charge was inconsistent with the Court's prior definitions of "willful" in that it added the additional factors of a stubborn, obstinate or perverse act, factors which had not been alluded to previously by the Court.

Clearly, the confused references to the word "willfully" and the confused and inconsistent charge of the District Court as to what the word "willfully" meant is so different from the definitions of the Seventh Circuit that this Honorable Court should grant the Petition.

A third area of conflict in the law which highlights an important Federal question which should be resolved by this Court is the conflict between the instant case and the line of cases involving the section of the Internal Revenue Code prohibiting any person from "willfully" failing to pay a tax, make a return or keep appropriate records, 26 U.S.C. §7203. In interpreting this statute, various Courts of Appeal have held the word "willful" to require *a specific wrongful intent or evil motive. U.S. v. Palermo,* 259 F.2d 872 (3rd Cir., 1958); *U.S. v. Jannuzzio,* 184 F. Supp. 460 (D. Del., 1960).

In *U.S. v Vitiello,* 363 F.2d 240 (3rd Cir., 1966) the Court held that it was error to charge the jury that it could find willfulness in conduct characterized by mere careless disregard of a legal obligation or in capricious acts unjustified by reasonable belief in their legality. In *Haner v. U.S.,* 315 F.2d 792 (5th Cir., 1963), the Court held that a definition of willful which was limited to the absence of a ground for believing the act lawful or marked by a careless disregard whether or not one has the right to so act was error and was criticized as improperly diluting the requirement of scienter in the act.

Finally, in *U.S. v. Weiler,* 385 F.2d 63, (3rd Cir., 1967), the Court interpreted 18 U.S.C. §1001 which makes it a crime to willfully falsify or make a false statement in any matter within the jurisdiction of a United States department or agency. The Court relying

on *U.S. v. Palermo, supra,* held that the element of willfulness required the proof of an evil motive.

While acknowledging that willfulness when ordinarily employed in a criminal statute generally means an act done with bad purpose, the Court of Appeals for the Third Circuit found that the less stringent definition employed by the District Court was acceptable because the purpose of the Labor-Management Reporting and Disclosure Act was not just to prevent embezzlement and fraud, but also to provide information for the membership so that they could control their leaders. The Court concluded:

> Therefore, even when false statement or omissions are not elements of schemes to defraud, they obstruct legitimate goals of the LMRDA. However, the elimination of a requirement of evil intent or bad purpose will not operate as a trap for the unwary. There can be no basis for asserting a lawful purpose for the knowing entry of a deceptive statement or the omission of accurate ones in books of account. Knowledge of false statement or misrepresentations of material facts done in reckless disregard of the law are sufficient culpable conduct to merit punishment under Section 209. (Citations omitted, Appendix D, p. 39a).

The Court of Appeals proves too much. The rationale recited in affirming the District Court's decision is equally applicable to the Internal Revenue Statute and 18 U.S.C. §1001. It is equally true that there can be no basis for asserting a lawful purpose for knowingly failing to pay a tax, make a return or keep appropriate records or knowingly falsifying or making a false state-

ment in any matter within the jurisdiction of a United States department or agency. Yet, despite this, the Courts of Appeals have held a finding of evil intention or motive a necessity before an individual can be convicted of the criminal act of violating the latter two statutes.

The case of *Colella v. U.S.*, 360 F.2d 792 (1st Cir., 1966), *cert. denied* 385 U.S. 829, (1966), further illustrates the confusion in the case law regarding the proper definition of "willfully". That case held that, in statutes which denounce offenses involving turpitude, willfully generally means with an evil purpose, criminal intent or the like.

Section 504 LMRDA provides that any person convicted of a violation of Section 209 may not serve a labor union in any position of any responsibility for a period of five years. Such a drastic penalty is comparable to conviction for treason and, in and of itself, constitutes sufficient grounds on the basis of public policy and simple justice that the definition of willfully, as established in the income tax cases and in the interpretation of 18 U.S.C. §1001, be applicable to the LMRDA.

It is submitted that the decision of the Court of Appeals affirming the definition of "willfully" as used in §439(c) of Title 29 is an extremely important question of Federal law which has not been but should be settled by the Supreme Court of the United States. Regulating as it does the actions of thousands of labor unions across the country and thousands more labor union officials, the Labor-Management Reporting and Disclosure Act is an extremely important statute and one which should be definitively interpreted so as to

provide the maximum amount of guidance to those whose actions are regulated by it as well as to those charged with its enforcement. For these reasons, this Petition should be granted.

2. This Court should grant Petitioners a writ of certiorari for the reason that the Court of Appeals for the Third Circuit had decided a second important question of Federal law which has not been but should be settled by this Court. The Court of Appeals affirmed sub silentio the refusal of the District Court to charge the jury that if the Petitioners were found guilty they would be prohibited in accordance with 29 U.S.C. §504 from holding union office for a period of five years beyond the termination of any sentence imposed. Just as in the case of a homicide prosecution wherein by setting the degree of homicide the jury invokes automatic penalties and must therefore be so advised, so in the instant case, the automatic penalty should have been outlined to the jury.

3. The Petition for Writ of Certiorari should be granted for the further reason that the Court of Appeals for the Third Circuit has decided an important Federal question in conflict with the prior applicable decisions of this Court.

In *United States v. Stirone,* 361 U.S. 212 (1960), this Court reversed a conviction under the Hobbs Act, 18 U.S.C. §1951 on the grounds that the District Court, by admitting testimony relating to alleged extortionist activities not contained in the indictment, had permitted the Defendant to be tried on charges not contained in the indictment. On the basis of the Fifth Amendment, this Court held that a prosecution must be begun by an

indictment. It further held that the variation between pleading and proof allowed in the trial destroyed the Defendant's substantial constitutional right to be tried only on charges presented in an indictment returned by a Grand Jury. This Court noted that this right was a basic one and its deprivation was far too serious to be treated as nothing more than a variance and harmless error.

As indicated above, Petitioners were indicted only for willfully making or causing to be made false entries in the books and records of District 5. The only mention in the indictment of the alleged purpose of these charged acts is found in Count I, wherein it states that the purpose of the conspiracy was "to make and cause to be made false vouchers and false financial reports which would be used to obtain monies from the bank account of District 5, United Mine Workers of America.

Despite the strict limitation of language in the indictment, the Court permitted testimony and argument to the effect that the money involved was allegedly intended for use in the nomination and election campaign of W. A. Boyle for office of International President of the United Mine Workers of America (pp. 82a-83a, 299a, 571a-575a, 981a, 1352a, 1390a-1393a). Furthermore, the Court incorporated in its charge to the jury the very same allegations (pp. 1634a-1635a). Indeed, the Court of Appeals characterized these allegations as being "critical in this case." (Appendix D, p. 45a) The use of union funds to promote the candidacy of any person in a union election is a violation of 29 U.S.C. §481(g) and 29 U.S.C. §501(c). As such, it comprises a separate and distinct offense under the Labor-Management Reporting

and Disclosure Act. By permitting such testimony and argument and including these allegations in its charge, the Court permitted the Defendants to be tried on charges not contained in the indictment. Petitioners' basic Fifth Amendment right to be tried only on charges presented on an indictment returned by a Grand Jury were, therefore, violated.

In *Chapman v. State of California,* 386 U.S. 18 (1967), this Court held that before a constitutional error can be regarded as harmless, the Court must be able to declare a belief that the error was harmless beyond a reasonable doubt (386 U.S. at 24). As in the *Stirone* Case, there is no way the Court can be certain that the Defendants were not convicted of diverting union funds to finance the election campaign of W. A. Boyle. Accordingly, this Court should grant the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

4. This Court should grant the Petition for a Writ of Certiorari for the further reason that the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings in the following ways:

A. The Court of Appeals ignored Petitioners' appeal of their request for the introduction into evidence of the Government's Trial Memorandum and in refusing to permit defense counsel to refer to the admission contained therein (pp. 1066a-1068a, 1423-1424a). Admissions of counsel within the scope of their authority bind their clients. The Government's trial Memorandum was prepared for trial and was submitted to the Court by trial counsel. The Memorandum stated explicitly that

there was no disbursement of funds involved in the case. By virtue of Section 201(b) of the Act, 29 U.S.C. §431 (b), this admission would have required the acquittal of Petitioners. If counsel makes an admission though nothing more than an inference from evidence on which he bases his argument, the Court may properly accept the admission though drawing a different inference adverse to the interests of the counsel's clients' case. See, *O. F. Nelsen and Co. v. U.S.*, 149 F.2d 692 (9th Cir., 1945) *rehearing denied* 169 F.2d 833 (9th Cir., 1948); *International Brotherhood of Boilermakers v. Rafferty*, 348 F.2d 307 (9th Cir., 1965). The Court further erred in refusing to admit the Memorandum as real evidence of the Government's admission. *Nourse v. Reddell*, 143 F. Supp. 759, (S.D. Cal., 1956).

B. As was pointed out above, the District Court defined willfully to the jury at the beginning of the trial with the tacit approval of Government counsel. Counsel for the defense tried their cases and prepared their summations to the jury relying on the Court's initial definition. As heretofore noted, (See Statement of the Case, *supra*) the Court interrupted Attorney Simmons during his summation to the jury and refused to allow him to quote the Court's own initial definition of the word "willfully". The attorneys for the Defendants and the jury were told that the Court was going to define the word "willfully" in a different manner for the first time during the trial. This action of the District Court denied the Defendants effective assistance of counsel. The closing arguments are designed to give counsel an opportunity to outline their entire defense to the jury and argue both the facts and the law as they see them in defense of their clients. It is well established that coun-

sel may argue their view of the law to the jury so long as the jury understands that they are to take the law from the instructions of the Judge. *Mines v. Kling,* 8 Lycoming 78 (Pa. Com. Pleas); *Jenkins v. Harrey C. Hines Co.,* 141 S. E. 2d 1 (N. C. 1965). By interrupting counsel on several occasions during their closing and prohibiting them from arguing to the jury from the statute under which Defendants were being prosecuted as well as from the very definitions of the terms "willful" enunciated by the Court (Ap. pp. 65a, 211a), the Court impeded and disrupted the development of counsels' arguments and made effective argument impossible at that point, inasmuch as counsel had relied on the Court's own law in formulating and preparing their arguments the previous night. Defendants were thereby denied effective representation in derogation of their constitutional rights.

The Court further erred in preventing any rational argument to the jury on the question of willfulness by refusing Point 4 of Defendants' Requests for Charge on Wednesday, May 5, 1971 (p. 1434a), and then reading that same requested charge to the jury on Thursday, May 6, 1971 (1653a), after Defendants had argued their case before the jury.

For these reasons, the Petition for Writ of Certiorari should be granted.

5. The Supreme Court should grant the Petition because, contrary to decisions of this Court, the District Court permitted the introduction of inculpatory hearsay over defense objections to the prejudice of Petitioners and, even though this was clearly raised before the

Court of Appeals, that Court did not mention or dispose of it in its decision.

Francis McCallister, an unindicted alleged co-conspirator, was called as a defense witness. During cross examination, Government counsel inquired whether he had agreed to support Jock Yablonski in the union election, and whether he had stated to both Jock Yablonski and Government rebuttal witness, Leon Yablonski, that Defendant Budzanoski had attempted to take money out of union funds to support Boyle's campaign. McCallister denied both allegations. (Ap. pp. 980a-982a, and printed hereinbefore in the Statement of the Case).

After the defense had rested, the Government produced Leon Yablonski as a purported rebuttal witness. Over objection of defense counsel, he was permitted to testify to an alleged conversation between his deceased brother, Jock Yablonski, and McCallister, wherein McCallister supposedly narrated, inter alia, every single element of the crime charged against Defendants. All of this testimony by Leon Yablonski was clearly hearsay, but if believed by the jury would certainly convict Defendants. (Ap. pp. 1390a-1393a, and printed hereinbefore in the Statement of the Case).

The Court of Appeals did not even discuss the error of the District Court in permitting the introduction of this inculpatory hearsay, although the error was raised at page 29 of Defendants' Brief to the Court of Appeals, wherein it is stated:

> . . . Such fundamental injustice in the admission of inculpatory hearsay statements has been condemned by the Supreme Court. *Krulewitch v. U.S.*, 336 U.S. 440 (1949); *Bruton v. U.S.*, 391 U.S. 123,

128 fn. 3 (1968). Moreover, the Court failed to caution the jury as to the purpose and effect of Yablonski's testimony.

It is submitted that the admission of this testimony was egregious error and requires the granting of a new trial.

A further reason for the granting of this Petition is found in the same subject matter, wherein the District Court again, in a different sense, departed from the prior decisions of this Court. Clearly, the alleged statements of McCallister, about which Leon Yablonski testified, were made after the alleged conspiracy had ended, since they were allegedly made on May 31, 1969. (Ap. p. 1388a, and printed hereinbefore in the Statement of the Case). The alleged conspiracy ended on May 29, 1969, according to the evidence presented by the Government and the indictment. (Ap. p. 7a). Since the conspiracy had ended prior to the alleged conversation between McCallister and Jock Yablonski, the alleged statements of McCallister could not have been made in furtherance of the conspiracy and, in fact, the very substance of the alleged statements establishes that they could not have been made in furtherance of the alleged conspiracy. It is uncontradicted that neither of the Defendants was present during the alleged conversation.

The case of *Krulewitch v. U.S.*, 336 U.S. 440 (1949) is directly in point. There, the trial court admitted into evidence an extra-judicial statement, attributed to a co-conspirator, which implied that the defendant was guilty. The alleged statement was said to have been made after the acts with which defendant was charged had been completed. The defendant's conviction was af-

firmed by the Court of Appeals. Reversing the court below, the Supreme Court held, in an opinion by Justice Black, that the alleged hearsay statement of the co-conspirator was inadmissible because it was made after the objectives of the conspiracy either had failed or had been achieved. See also *Bruton v. U.S.*, 391 U.S. 123, 128, fn. 3 (1968).

A still further reason for the granting of this Petition involves the procedures allowed in the manner of presentation of this same subject matter. The Court of Appeals, by affirming the District Court, clearly sanctioned a departure from the accepted and usual course of judicial procedure. The Defendants contended that the hearsay stated by Leon Yablonski was an attempt to attack the credibility of a witness on collateral matter and, therefore, was not permissible. (Ap. p. 1385a, and printed hereinbefore in the Statement of the Case). The Court of Appeals, in rejecting Defendants' contention, stated, at Appendix D, pp. 44a-45a:

> Appellants finally contend that it was error for the trial judge to permit Leon Yablonski to impeach defense witness and co-conspirator Francis McCallister with regard to a conversation in which McCallister supposedly admitted to Leon and Jock Yablonski that the money was being drained off to support Boyle's condidacy. On direct examination, McCallister testified that the purpose of the fund was for the organizing campaign in the fall, and the Government attempted to question that assertion on cross-examination. McCallister admitted having met with the Yablonskis but denied having made the statement. On rebuttal, the Government called Leon Yablonski who stated that McCallister

had made the admission. Appellants contend the statement was collateral to the proceedings, foreclosing any further inquiry into the subject after McCallister had denied making the statement.

They misapprehend the situation. A matter is collateral when it cannot reasonably be considered crucial or material to the issues on trial. *Berry v. Monongahela Connecting R. Co.*, 397 F.2d 181 (3rd Cir., 1968). *The issue of the purpose of the cash fund was obviously critical in this case . . .* (Emphasis supplied).

The holding of the Court of Appeals has made the horns of the Government dilemma exceedingly sharp. If, as held by the Court of Appeals, the issue of the purpose of the cash fund was crucial or material to the issue on trial, then the testimony of Leon Yablonski could only have been introduced in the Government's case in chief and, therefore, was improper rebuttal. The admission of Leon Yablonski's testimony, in its substance and situated as it was by the Government, was extremely prejudicial to Defendants and was a serious departure from the accepted and usual course of judicial procedure, at least to the extent of constituting a gross abuse of discretion by the District Court.

CONCLUSION

For the foreging reasons, the Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff v. MICHAEL BUDZANOSKI and JOHN SEDDON, Defendants.	Criminal Action No. 70-216

Memorandum

MILLER, D. J.

The Indictment in this case arises from grand jury proceedings in the District of Columbia and the Western District of Pennsylvania. Each of four persons named in the Indictment as "unindicted co-conspirators" testified at one or both of the grand jury proceedings. Now before the Court is defendants' "Motion for Discovery", which seeks pretrial disclosure of the grand jury testimony of the four unindicted co-conspirators and the transcript of the entire proceeding before the grand jury in the Western District of Pennsylvania.[1]

Insofar as disclosure of grand jury testimony of the unindicted co-conspirators is concerned, the law with respect to such discovery has undergone substantial change since the 1966 decision of the United States

1. In addition, defendants' motion encompasses the grand jury testimony of both defendants and all tangible objects, documents, etc., referred to or utilized or introduced in either of the proceedings; however, the government has voluntarily furnished this material to defendants.

Supreme Court in *Dennis v. United States.*[2] That case held that the defendants had demonstrated the requisite and traditional "particularized need"[3] to examine government witnesses' grand jury testimony after those witnesses testified at trial where (1) the grand jury testimony had been taken seven years prior to the trial; (2) the witnesses' testimony was crucial to the government's case; (3) the crucial testimony was largely uncorroborated; (4) two of the witnesses were accomplices, one of these a paid informer, and a third had reasons for hostility toward the defendants; and (5) one witness admitted that he had erred in earlier statements about significant dates.[4] In spite of this compelling factual showing of particularized need, many lower courts have interpreted the *Dennis* case as substantially liberalizing the prerequisites for discovery of grand jury testimony.[5] Even the more liberal interpretations of *Dennis,* however, are generally limited to the discovery of a witness' grand jury testimony after that

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2. 384 U.S. 855 (1966).

3. See *United States v. Procter & Gamble Co.,* 356 U.S. 677 (1958) and *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395 (1959) as to requirement for showing particularized need.

4. 384 U. S. 855 at 872, 873.

5. See *Allen v. United States* 390 F. 2d 476 (D.C. Cir. 1968); *Cargill v. United States,* 381 F. 2d 849 (10 Cir. 1967). The Second Circuit in *United States v Youngblood,* 379 F. 2d 365 (1967) and the Seventh Circuit in *United States v. Amabile,* 395 F. 2d 47 (1968) have held that the defense is entitled, as a matter of right, to that portion of a government witness' grand jury testimony which deals with the same subjects that he testified about at trial.

witness has been directly examined at trial, because it is that circumstance which obviates the time-honored reasons for maintaining secrecy.[6]

Pretrial disclosure of grand jury testimony, as has been requested here, is another matter. While such disclosure is neither unprecedented,[7] nor unjustified in some circumstances,[8] it is certainly contrary to the weight of authority, both in this Circuit and elsewhere.[9] The reasons set forth by defendants here for release of the grand jury testimony are, in some respects, comparable to those set forth by the Supreme Court in *Dennis*. Here, as in *Dennis*, the testimony sought is that of "key" witnesses, probably essential to the government's case. As unindicted co-conspirators, and fellow members of the District Five Executive Board, United Mine Workers of America, the four government witnesses may well have reasons for hostility toward defendants. On the other hand, there is not likely to be any substantial time span between the grand jury proceedings and trial of this case; there is no reason to assume that the four witnesses' testimony will be

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6. *United States v. Youngblood, supra*; *United States v. Amabile, supra, United States v. Burgio,* 279 F. Supp. 843 (S.D. N.Y. 1968); *United States v. Jaskiewicz,* 272 F. Supp. 214 (E.D. Pa. 1967).

7. See *United States v. Hughes,* 413 F. 2d 1244 (5 Cir. 1969).

8. See *Allen v. United States, supra, at* 482, ftnt. 16.

9. *United States v. Bertucci,* 333 F. 2d 292 (3 Cir. 1964); *Hanger v. United States,* 398 F. 2d 91 (8 Cir. 1968); *United States v. Jaskiewicz, supra; United States v. Burgio, supra.*

uncorroborated; and none of the witnesses is alleged to have made inconsistent statements about the subject matter of their testimony. Most important, as pointed out earlier, the discovery in *Dennis* was not requested until after the government witnesses had testified at trial, while defendants' request in the present case seeks discovery substantially prior to trial.

One of the primary and traditional reasons for maintaining secrecy of grand jury minutes is to prevent subornation of perjury or tampering with witnesses who have testified at the grand jury proceeding and may later appear at the trial of those indicted.[10] Of course, this reason is no longer applicable after the witness has testified at the trial. In the present case all four witnesses whose testimony is sought are members of the District Five Executive Board, United Mine Workers of America. Defendants Budzanoski and Seddon are President and Secretary-Treasurer, respectively, of that Board. The Indictment charges financial irregularities and manipulations in connection with the operation of District Five. While the Court has no intention of calling into question the character of the defendants, who are presumed innocent at this stage, it must be pointed out that if the above-noted, time-honored principle retains any validity as a reason for maintaining secrecy of grand jury minutes, then its peculiar applicability to the circumstances surrounding this indictment cannot and will not be ignored.

In the absence of a specific post-*Dennis* ruling to the contrary by the United States Court of Appeals for

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10. *United States v. Rose,* 215 F. 2d 617 (3 Cir. 1954).

the Third Circuit, this Court would not hesitate to order pretrial disclosure of grand jury testimony where the traditional reasons for secreting that testimony are inapplicable. In the present case, however, one such reason has substantial applicability, and the matters set forth by defendants in an attempt to show particularized need[11] do not justify an exception, at this stage of the proceeding, to the long-established policy of secrecy. Accordingly, defendants' request for pretrial disclosure of the grand jury testimony of the four unindicted co-conspirators will be denied.

Defendants' request for disclosure of the entire transcript of grand jury proceedings in the Western District of Pennsylvania is made "in order to prepare and support a Motion to Dismiss" the indictment,[12] pursuant to Rules 6(e) and 16(b), Federal Rules of Criminal Procedure. In support of their request, defendants have set forth six unsubstantiated allegations of impropriety before the grand jury, some of which are patently frivolous. Without belaboring the point, it can fairly be said that the various allegations of abuses of the grand jury process, unsupported by a single affidavit, are based upon suspicion and surmise. Without

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11. Paragraph 10 of defendants' Motion for Discovery, in addition to alleging that the unindicted co-conspirators are key witnesses and hostile to defendants, stated: "Defendants need to inspect and copy or photograph the testimony of the aforenamed persons before either and both Grand Juries in order for Defendant to prepare their defense, to prepare their cross-examination of the government witnesses and/or to prepare their impeachment of the government witnesses."

12. See paragraphs 11 through 15 of Motion for Discovery.

more, the Court would be inclined to deny defendants' motion for wholesale discovery forthwith. In the present case, however, the attorney representing the United States has executed, under oath, an affidavit based upon personal knowledge which unequivocally and specifically denies each allegation of impropriety. The material contained in the government's affidavit remains uncontroverted by defendants. Accordingly, the request for disclosure of the entire transcript of the grand jury proceedings in the Western District of Pennsylvania will be denied.

An appropriate order will be entered.

Order of Court

AND NOW, to-wit, this 10th day of December, 1970, it is ORDERED, ADJUDGED and DECREED that, for the reasons set forth in the foregoing Memorandum, the defendants' Motion for Discovery is denied.

/s/ JOHN L. MILLER
United States District Judge

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Appendix "B."

APPENDIX "B"

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Plaintiff vs. MICHAEL BUDZANOSKI and JOHN SEDDON Defendants	Criminal Action No. 70-216

Opinion

WEBER, J. February 18, 1971

Defendants are charged in Counts II and III with causing two false expense vouchers to be submitted in March 1969 to their labor organization, and in Count IV of causing a false entry to be made in the books, records and reports of the organization by filing a false monthly financial report from the district union to its international union in violation of 29 U.S.C. 439(c).

Defendants move to dismiss these counts of the indictment on the grounds that even if such records, entries or reports were false, they do not constitute a violation of Sec. 209 of the LMRDA [29 U.S.C. 439] because the particular records, entries or reports were not those required by Sec. 201(b) of the Act [24 U.S.C.A. 431(b)].

This section requires the filing of an annual financial report, and the report for the year in which the entries were made had not yet been prepared.

Sec. 206 of the Act [29 U.S.C.A. 436] requires that records on the matters to be reported shall be maintained for a period of not less than five years after the filing of the required reports, which will provide in sufficient detail the necessary basic information and data from which the reports may be verified.

Defendants argue that no specific system of bookkeeping is required of the labor organization, and that therefore the only thing required of the persons required to file reports is that they maintain some supporting information for five years after filing the annual report. As a corollary to this argument Defendants assert that any additional records which the union chooses to maintain to record their internal financial transactions or financial status from time to time during the course of the year are not subject to the provisions of the Act.

Defendants also contend that because their financial records were seized several months before the annual report for 1969 was due to be filed, none of the seized records can be considered as books or records required to be kept to substantiate the annual report for 1969. This assumes that these documents do not become the substantiating record or data until the report is filed and that the person required to report is free to charge, alter, correct or reconstruct any of this data up until the date the report is prepared and filed.

Defendant argues that Sec. 206 only requires records to be kept for a period of *five* years after the

filing of the annual reports on the transactions which they represent. From this Defendants come to the conclusion that there is no requirement that any documents be kept from the date of the transactions they represent. Defendants also reach the conclusion that there is no requirement that the Defendants keep or record any vouchers until the annual report is filed and that therefore any such vouchers made, even if false, were not documents required by Sec. 206 [29 U.S.C. 436] of the LMRDA and therefore cannot constitute an offense under Sec. 209 [29 U.S.C. 439].

We cannot accept this sophistry. Sec. 206 [29 U.S.C.A. 436] specifically requires:

1. that records be maintained on the items required to be reported,

and

2. this shall include vouchers and receipts.

We cannot come to any other conclusion but that persons required to report shall maintain contemporaneous records. This is one of the common definitions of the word "record" used as a noun:

"An official contemporaneous document recording the acts of some public body or public officer",

or

"An official contemporaneous memorandum stating the proceedings of a court of Justice."

Webster's Third New International Dictionary (unabridged 1966).

Similarly the Act refers to "vouchers", which are defined by the same dictionary as:

"a documentary record of a business transaction"

all of which form part of a ""voucher system" which is defined as:

> "a system of accounting in which a voucher (as for an account payable) is prepared usu. with supporting documents attached for each transaction or a series of transactions effecting a single account and when approved is entered in a voucher register",

the voucher register being also defined as

> "a book of original entry for vouchers."
>
> (Ibid)

Thus when the statute says that persons required to report shall maintain records, which include vouchers and receipts, we find the plain intention of the statute to mean the type of records that are made contemporaneously with the transaction, which attest to the transaction and by which the information on the required annual report may be verified by the usual auditing practice of examination of the contemporary record of the transaction.

Is the subject matter of the vouchers a matter upon which the labor organization must report? Sec. 201(b)(6) requires that the annual report include,

> "other disbursements made by it including the purposes thereof."

Therefore, if the labor organization must report disbursements, it must under Sec. 206 [29 U.S.C.A. 436],

> "maintain records on the matters required to be reported."

The manner of keeping such records is not directed but having adopted a voucher system and a monthly report

system for internal use, these become the records of the matters, and under Sec. 209(c) [24 U.S.C.A. 439 (c)], anyone who wilfully makes a false entry in any books, records, or reports required to be kept is guilty of an offense under the Act.

We believe that Counts II, III and IV properly charge offenses under the Act. Count I charges a conspiracy to commit the acts charged in Counts II, III and IV.

Defendants also attack the indictment on grounds relating to the proceedings before the Grand Jury, where Defendant Budzanoski was invited to testify, and where he was informed in the presence of the Grand Jury that he was a prospective defendant. We find no merit in the contentions of defendants with respect to the Grand Jury proceedings.

Nor do we find the requirements of 29 U.S.C. 436 so vague as to be unconstitutional. The type of records to be kept are defined with sufficient particularity. The statute has been sustained against such attack. *U. S. v. Haggerty,* 419 F. 2d 1003 [7th Cir., 1969].

Appendix "B."

Order

AND NOW this 18th day of February, 1971, after consideration of briefs and oral argument, Defendants' Motion to Dismiss the Indictment is DENIED.

GERALD J. WEBER
United States District Judge

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APPENDIX "C"

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA v. MICHAEL BUDZANOSKI and JOHN SEDDON	No. 70-216 Criminal

Opinion

HUBERT I. TEITELBAUM, District Judge

The defendants were convicted by a jury of conspiring to violate and violating, in four counts, the Labor-Management Reporting and Disclosure Act of 1959. They now move for a new trial, judgment of acquittal, and arrest of judgment. Count I of the information charged a conspiracy to violate 29 U.S.C. §439(c)[1] in violation of 18 U.S.C. §371[2]. Counts II, III, and IV charged actual violations of 29 U.S.C. §439(c). The charges emanate from false entries allegedly made or

1. Section 439(c) provides that,
"[A]ny person who willfully makes a false entry in . . . any books, records, reports, or statements required to be kept by any provision of this subchapter . . ."
shall be guilty of an offense against the United States.

2. Section 371 provides that,
"[I]f two or more persons conspire to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy . . ."
each is guilty of an offense against the United States.

caused to be made by the defendants in certain books and records of District 5, United Mine Workers of America. Taking the facts and drawing the inferences reasonably consistent with the evidence in favor of the Government,[3] we opine the following facts. At an executive board meeting of the members of the Executive Board of District 5, UMW, the President of District 5, defendant Budzanoski, outlined to the Board a plan designed to divert money from the treasury of District 5 for the purpose of financially assisting the re-election campaign of the President of the United Mine Workers International, W. A. Boyle. The plan called for certain members of the Board, the four unindicted co-conspirators, Marion Pellegrini, Peter Halvonik, Roland Nuccetelli and Francis McCallister, to submit false vouchers of expenditures, to cash the checks received for the vouchers, and to return the cash to defendant Seddon. In pursuit of this plan, Pellegrini and Halvonik submitted vouchers, for $1,870.00 and $2,370.00 respectively, which purported to seek reimbursement for monies spent to prevent the spread of certain wildcat strikes. In fact such monies had not been spent. Knowing the vouchers were false, defendant Seddon issued checks to both Pellegrini and Halvonik in the amounts of the vouchers. Pellegrini and Halvonik, in turn, cashed the checks and returned the proceeds to Seddon. The plan constituted Count I, the false vouchers Counts II and III, and a financial report reflecting Pellegrini's falsely vouched expenses of $1,870.00 Count IV.

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3. *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Stubin*, No. 19,561 (C.A. 3, July 15, 1971).

Appendix "C."

I. MOTIONS FOR A NEW TRIAL

The defendants' motions for a new trial are based on myriad assignments of error, including judicial harassment of defendants' counsel and judicial assistance of Government counsel. Most of the assignments are traceable to the same unrestrained and indiscriminate zeal which characterized the approach of defendants' counsel to the trial. The continual probing and frequent exceeding of the bounds of trial propriety by Attorney Simmons particularly, necessitated the bulk of the rulings of which the defendants complain. Many of the assignments deal with matters discretionary with the Court, no abuse of which is arguable.[4] Many of the assignments, in context, are frivolous,[5] and many plainly unsupported by the record. Others were not preserved by objections at trial. None of these will be reviewed individually.

Those few assignments of error which do merit comment are, at best, insubstantial. The admission of

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4. See *United States v. Stirone,* 311 F.2d 277 (C.A. 3, 1962) and *United States v. Stayback,* 212 F.2d 313 (C.A. 3, 1954).

5. For example, defendants assert error in the Court's cautions to the jury that questions posed on cross-examination are not to be considered as substantive evidence of the answer suggested thereby. The duty of the trial Court to control those questions was recently observed by this Circuit in *Fuhrman v. Reading Company,* No. 19,034 (C.A. 3, March 11, 1971). Attorney Simmons went so far, at one point, as to remark aloud, following the testimony of a Government witness, that he might want to put a man on to rebut that witness. The impropriety of this remark, as well as the duty of the Court to admonish Attorney Simmons and caution the jury was manifest.

the testimony of the Government's rebuttal witness Leon Yablonski is questioned. Yablonski was called by the Government to testify to certain statements made to him and his deceased brother, Joseph Yablonski, by Francis McCallister, an unindicted co-conspirator and a defense witness. The defendants contend that the appearance of Yablonski was "highly prejudicial" and that his testimony should not have been admitted principally because McCallister's statements were hearsay and not excepted since they were not made in furtherance of the conspiracy. We think, however, that the testimony was admissible not for its value as affirmative evidence, but as appropriate impeaching evidence. Clearly prior inconsistent statements are admissible to impeach the credibility of a witness. See *Isaac v. United States,* 431 F.2d 11 (C.A. 9, 1970). Moreover, the prior inconsistent statements concerned the core of the charges, and therefore were not improper as impeachment relating only to collateral matters.

The defendants also question the exclusion of the testimony of defense witness Thomas McMillan. The defendants sought to have McMillan testify as to his opinion of what records are required to be kept under the Labor-Management Reporting and Disclosure Act. McMillan, an accountant with the United Mine Workers International, Washington, D. C., was permitted to testify as to what records he *thought* were required to be kept. The matter of what records were actually required to be kept, however, was deemed one factually only for an expert witness charged with the administration of the Act, and legally for the Court.

Defendants assign as error the confrontation of defendant Seddon with his testimony before a Grand Jury.

That testimony was posed solely for impeachment purposes, i.e., impeachment by a prior inconsistent statement, and for that purpose was clearly admissible. See *Harris v. New York,* .... U.S. .... (1971). Moreover, the form of confrontation was impeccable.

Defendants additionally assign as error the Court's denial of defendants' motion for severance. At the time of the denial, prejudice resulting from trying the defendants together warranting severance was remote, if not inconceivable. The passing of the trial, in retrospect, clearly supports the denial.

Finally, included among defendants' assignments of error are references to the instructions of the Court. Specifically, defendants regard as erroneous the Court's definitions of "willfully", "disbursement", and "labor organization". These assignments are those which merit the most comment. With regard to the definition of "willfully", the defendants contend, (1) that the Court's charge was confusing and (2) that the Court's charge misstated the law. The defendants contend that the Court's charge was confusing in that in the preliminary charge "willfully" was defined to mean with evil or bad purpose, while in the final charge "willfully" was defined to mean simply with reckless disregard for the law. This contention is not entirely accurate. In the final charge, the Court explained to the jury that the term "willfully" included an act with evil or bad purpose, but that, more broadly, it included an act in reckless disregard for the law or the provisions of the law. The Court further explained that for an act to be willful, it need not necessarily be with evil or bad purpose; that an act found to be with careless disregard of

whether or not one has the right to act is an act which is "willfull". Certainly the final charge, which was by nature more elaborate and elucidative than the preliminary charge, presented a clear definition of the meaning of the term "willfully".

Further, it is clear that violations of the Labor-Management Reporting and Disclosure Act are not required to be with evil or bad purpose. The acts proscribed are *malum prohibitum* misdemeanors, which acts are generally made unlawful if done with reckless disregard for the law. See *United States v. Ryan,* 350 U. S. 299 (1956). The charged offenses, therefore, are, as the jury was instructed, violable by acts which are "wholly in disregard of what the law may provide, and in pursuit of a course without making a reasonable effort to determine whether the plan pursued was contrary to law".[6] See *Brennan v. United States,* 240 F.2d 253 (C.A. 8, 1957), *cert. den'd* 353 U.S. 931 (1957); *Korholz v. United States,* 269 F.2d 897 (C.A. 10, 1959).

The importance of the construction of the term "disbursement" is that it is crucial to the determination of whether or not the vouchers submitted by Pellegrini and Halvonik were records required to be kept by

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6. Recently, in *United States v. International Minerals & Chemical Corp.,* .... U.S. .... (June 1, 1971), the Supreme Court held that a misdemeanor was committed "knowingly" if the act committed suggested, by its nature, a probability of regulation so great that the actor must be presumed to be aware of the regulation. In that sense, "knowingly" is analogous with "willfully" as that term is used in making certain acts misdemeanors.

§436 of the Act.[7] The defendants argue that no "disbursement" was made from the District Treasury because the members of the Executive Board of District 5 were the trustees of all monies of the District. The argument continues that because the money involved was at all times in the hands of one or another of the members of the Board, it was held in trust. The Court's charge instructed the jury that this argument "should not alter [its] findings in any respect." While it may be that a member of the Board who holds money pending its future expenditure acts as a trustee, a member of the Board who receives money purportedly for reimbursement of a past expenditure most assuredly does not act as a trustee. Thus, the Court charged that a "disbursement" was made if it was found that a check was issued in reimbursement of a false voucher. And since it was uncontroverted that a check was issued in reimbursement of a false voucher, the Court while it did not withdraw the matter from the jury, suggested that the jury should find that there was a "disbursement". We think, that this evidentiary interpolation of a fairly technical matter was not only sound, but necessary.

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7. Generally, §439(c) makes it unlawful to falsify an entry required to be kept by §436. Section 436 provides that,

> "[E]very person required to file any report under this subchapter [i.e., labor organizations] shall maintain records [including 'vouchers'] on the matters required to be reported . . ."

In turn, Section 431(b) requires labor organizations to report on, *inter alia*, "disbursements". Thus, a false voucher of a disbursement is unlawful under §439(c).

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The defendants further argue, strenuously, if futilely, that District 5, United Mine Workers is not a "labor organization" within the meaning of the Labor-Management Reporting and Disclosure Act. This argument typifies defendants' straw-grasping. The proof of the Government squarely brought District 5 within the statutory definition. Section 402(i) of the Act defines "labor organization" as

> ". . . any organization of any kind, any agency or employee representation committee, group, association, or plan so engaged [" in an industry affecting commerce"] in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council, so engaged which is subordinate to a national or international labor organization . . ."

The testimony at trial was that District 5 represented employees concerning grievances and labor disputes and that it was an organization in which employees, as distinguished from management, participated. The contention that its lack of individual, i.e., personified, membership is totally irrelevant. Further, that it was engaged in an industry affecting commerce was substantiated by testimony that it was the certified representative of employees under the National Labor Relations Act.[8]

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8. Section 402(j) provides that a labor organization "shall be deemed to be engaged in an industry affecting commerce" if it is the certified representative of employees under the National Labor Relations Act.

Thus the facts and the law left no doubt that District 5 was a "labor organization".

In conclusion, the verdicts were neither against the law, the evidence, or the weight of the evidence, as defendants assert, and the motions for a new trial are denied.

II. MOTIONS FOR JUDGMENT OF ACQUITTAL

The thrusts of the defendants' motions for judgment of acquittal are two — (1) that there was no evidence of a "disbursement" and (2) that there was no evidence that the vouchers submitted were records which were required to be kept. The matter of whether or not a disbursement was proved has already been reviewed. The matter of whether or not there was evidence sufficient to submit to the jury the question of whether or not the vouchers were records which were required to be kept is equally as easily disposable. The evidence of the records required to be kept resulted from the testimony of Government witness John Murphy. The Assistant Director for the Division of Reports and Analysis, Office of Labor Management, Welfare Pension Reports, U. S. Department of Labor, Murphy testified that in his expert opinion vouchers of the kind involved in the instant information were required to be kept under the Act. He indicated that the premise of his opinion was that §431(b) requires a labor organization to submit a report of, *inter alia,* its "disbursements", and that §436 requires a labor organization to retain, *inter alia,* the "vouchers" which support its disbursements. Continuing, he testified that in his opinion the documents submitted by Pellegrini and Halvonik were vouchers used to support disbursements. This evidence

clearly established that the vouchers were records required to be kept under §436.

Generally, the evidence adduced at the trial was abundantly sufficient to sustain the convictions, and the motions for judgment of acquittal are denied.

III. MOTIONS FOR ARREST OF JUDGMENT

The motions for arrest of judgment are based essentially on two arguments — (1) that the submitted vouchers are not, as a matter of law, required to be kept under the Act and (2) that §436 in unconstitutionally vague. Both of these arguments must be considered only in the light of the information and the verdict. *United States v. Sisson,* 399 U.S. 267 (1970). In that light, the rulings of Judge Gerald J. Weber on the defendants' motions to dismiss the indictment, which were identically based, are the "law of the case" and cannot be disturbed. *U. S. v. Wheeler,* 256 F.2d 745 (C.A. 3, 1958). Nor should they be. Accordingly, the motions for arrest of judgment are denied.

An appropriate Order will be entered.

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Order

AND NOW, to-wit, this 20th day of August, 1971, IT IS ORDERED that the motions of the defendants' Michael Budzanoski and John Seddon for a new trial, for judgment of acquittal, and for arrest of judgment be and the same hereby are each denied.

HUBERT I. TEITLEBAUM
United States District Judge

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APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2030
No. 71-2031

UNITED STATES OF AMERICA
v.
MICHAEL BUDZANOSKI
JOHN SEDDON
MICHAEL BUDZANOSKI,
Appellant in No. 71-2030
JOHN SEDDON,
Appellant in No. 71-2031

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued March 17, 1972
Before ROSENN and ROSEN, Circuit Judges
and VAN ARTSDALEN, District Judge.

Opinion of the Court
(Filed June 12, 1972)

ROSENN, *Circuit Judge.*

I. THE FACTS

Appellants Michael Budzanoski and John Seddon are President and Secretary-Treasurer, respectively, of District 5 of the United Mine Workers of America, located in Pittsburgh, Pennsylvania. They were convicted

in a jury trial as indicted on four counts. Three of the counts charged them with violations of Section 209 of the Labor Management Reporting and Disclosure Act of 1959 (also known as the Landrum-Griffin Act, and known hereinafter as the "LMRDA"), 29 U.S.C. §439 (1970), by falsifying financial records their labor organization is required to keep under Sections 201 and 206 of the LMRDA, 29 U.S.C. §§431, 436 (1970). The fourth count charged them with conspiring between themselves and with others to cause false entries to be made on vouchers and monthly report submitted to District 5 in violation of 18 U.S.C. §371 (1970).[1]

At the trial, the Government relied principally on the testimony of two unindicted co-conspirators, Pellegrini and Halvonik. Their combined testimony established that on February 21, 1969, immediately following a regular monthly meeting of the executive board and staff, another session was held attended only by the defendants and other members of the board. At this meeting, the defendant Budzanoski informed his colleagues that he had been to Washington, D.C., and had obtained $10,000 from the International Union to be used in the reelection campaign of United Mine Workers President, W. A. "Tony" Boyle. Budzanoski then outlined the manner in which the money would be directed and funneled, without being traced, from the District's bank account and converted into cash for use in the forthcoming election campaign.

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1. The opinion of the district court denying appellants' motion to dismiss the indictment is reported at 322 F. Supp. 1064 (W.D. Pa. 1971).

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According to the Government's witnesses, the four board members were instructed by Budzanoski to prepare false vouchers indicating that they had spent a sum of money approximately $2000 each to avert the spread of wildcat "black lung" strikes from West Virginia to District #5.[2] Under this plan, each of them would receive checks drawn on the District from Seddon in payment of the vouchers for their "expenses." They were to cash the checks and turn over the proceeds to Seddon for use during the fall presidential campaign for Boyle.

After some prodding from Seddon, Pellegrini and Halvonik each submitted vouchers to him. They received checks from Seddon in the sum of $1870 and $2370 respectively, drawn on the District's bank account in payment of the false vouchers for "expenses" in the black lung campaign. Pellegrini immediately cashed his check and turned over the proceeds promptly to Seddon on or about March 26th. Halvonik carried his check around for several months and, after several reminders from Seddon, cashed it and turned over the proceeds to him on May 29th. Later, the other two executive board members of District #5, Francis A. McCallister and Roland Nuccetelli, submitted their vouchers to Seddon and received $2450 and $1870 respectively. The expenses listed on their vouchers are different from Pellegrini's and Halvonik's and are not part of the indictment. They also received checks in payment therefor, and after

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2. In February 1969 several thousand union miners went on wildcat strikes in West Virginia protesting inadequate compensation and medical benefits given to sufferers of a widespread miners' disease called "black lung" (pneumoconiosis). The strike spread to Pennsylvania and to three mines within the jurisdiction of District #5.

cashing them, delivered the proceeds to Seddon. None of the payees knew what happened to the money after that point.

Seddon, with Budzanoski's knowledge, placed all of this cash in his personal safe deposit box in a Pittsburgh bank. On July 14, 1969, when the defendants concededly became aware that the Federal Bureau of Investigation was investigating the use of union funds to promote the candidacy of the incumbent president, Boyle, in his re-election campaign against Joseph "Jock" Yablonski, they withdrew all of the money ($8560) from the safe deposit box. They flew to Washington, D.C., and deposited the money in the District's general checking account.

The evidence established that the District's monthly financial reports were regularly prepared by or under the direction of its Secretary-Treasurer, Seddon. The March financial report for District #5 lists the checks to Pellegrini and Halvonik as disbursements for "organizing expenses." It does not list Pellegrini's return of the money. The April report purports to reflect the payment to McCallister and the return to the union of the proceeds of the checks cashed by Pellegrini and McCallister. The executive board approved the March and April financial reports at its meeting on May 21, 1969.

In September, the entire executive board approved the financial statement for May, June and July, which together showed the payment to Nuccetelli and the return of all the remaining money from Halvonik and Nuccetelli.

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The defendants contended that the Government's story was implausible. Budzanoski, Seddon, Nuccetelli and McCallister all testified that they knew of no opposition to Boyle's re-election until May 1969. They denied Pellegrini's and Halvonik's contentions that by February rumors had circulated that two other men were going to run against Boyle, and in any case, they believed that neither man presented serious opposition. Budzanoski also claimed that the only $10,000 loan from the International to the District during the relevant months occurred in May 1969, not February.

The Government's witnesses, Pellegrini and Halvonik, supported "Jock" Yablonski in the election; defense witnesses McCallister and Nuccetelli supported the incumbent Boyle.

The defense presented its own version of the facts which was at odds with that of the Government. According to that version, the District in January 1968 had attempted to organize many of the non-union mines north and west of Pittsburgh, and it had always been short of cash in the field during the campaign. In the early months of 1969, the defendants testified that they were contemplating launching another campaign in the spring that would culminate in the fall with a major effort by International Union organizers and local union presidents. They alleged that they were urged by President Boyle to take some of the District's funds and convert them into cash so that they would not be short of funds this time.

Budzanoski testified that the only meeting he attended in Washington during the first two months of 1969 was the International Union's executive board

meeting on February 24-26. A major subject of conversation was the wildcat strikes over black lung disease, and President Boyle demanded that the districts make every possible effort to prevent the walkouts. Boyle feared that the union would be sued for damages by the coal companies, and he wanted his organization on record as firmly opposed to unauthorized stoppages. To bolster his position, he asked district presidents to send in any vouchers for expenses incurred by their staffs in attempting to stop the wildcats. The vouchers would be evidence of the union's good faith attempt to uphold contracts.

Budzanoski testified at trial that in the early part of March he casually asked Marion Pellegrini if he had expended any money attempting to curb the wildcats. Pellegrini said that he had not, but Budzanoski told him that if such expenses were required, Pellegrini should spend the money because it would be proof of the union's opposition to the strikes. Budzanoski testified that Pellegrini offered to go out and spend the money, but that he, Budzanoski, cautioned against unnecessary expense. Then Pellegrini supposedly came up with the idea of submitting vouchers for expenditures he never had incurred and returning the money to the union.

Budzanoski did not like the idea at first, but, as he thought about the fall organizing campaign's need for cash, he became convinced that Pellegrini's suggestion would solve two problems at once. He told Pellegrini to estimate how much his subdistrict would need for the organizing campaign and submit the voucher in that amount. Pellegrini supposedly thought it was a good idea and promised to go ahead and do it.

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Shortly after the meeting with Pellegrini, Budzanoski stated that he broached the plan to Halvonik, who immediately agreed to do the same thing. In the middle of March he talked to McCallister and Nuccetelli, and they also agreed to submit vouchers and turn the money back to the union for the fall campaign.

Budzanoski claimed that was the last he heard about the plan until March 21, when John Seddon asked him about the vouchers. Budzanoski and Seddon both testified that when Seddon gave Pellegrini and Halvonik their checks on March 20 and 21, Seddon was under the impression that they had actually incurred the expenses in attempting to curb the wildcat strikes. However, Seddon claimed that he was disturbed about the large amount of money being spent, and went to see Budzanoski to confer with him about the outlays.

Both defendants testified that Budzanoski then explained the voucher program to Seddon. Seddon was concerned, and Budzanoski conceded that Seddon warned him the vouchers were probably illegal. Budzanoski went on to explain that he did not see anything improper because the money was eventually to be used for a legitimate union purpose, but agreed that Seddon should talk to McCallister and Nuccetelli so that they would state different reasons on their vouchers. Notwithstanding the conversation, Seddon did not ask Pellegrini or Halvonik for new vouchers or additional information for the ones they had already submitted. Budzanoski claimed they did not attempt to change the records because the law required that no receipts or vouchers be destroyed.

Seddon put the cash into his own safety deposit box. He claimed that although the District had a safety deposit box in Pittsburgh, the key had been lost since 1965 and no one had ever taken the time to get a new one. Seddon claims that he had the money in an envelope identifying the contents as the union's, and Budzanoski stated that Seddon gave him a receipt for the money. However, Budzanoski could not produce the receipt at trial.

At trial, the Government questioned both defendants about why they engaged in such an elaborate scheme to convert the funds to cash so long in advance of the fall "organizing" push. Seddon claimed that he had little alternative because he refused to write a check to "cash." He believed that he could only assure accounting for all funds spent if he indicated an actual payee on each check. The defendants also contended that they took the money out so far in advance of the campaign because they were never sure when their checking account would be low, and they wanted to know they had the funds reserved when the time came to use them.

Both defendants and McCallister and Nuccetelli also testified that the first time financing Boyle's reelection campaign came up was in June, when all of the executive board members with the exception of Halvonik agreed to take out loans and repay them by taking $15 out of each of their paychecks.

After the money was returned to the union's bank account in Washington in July, defendants admitted that no actual organizing push took place. They stated that because of a variety of problems, they were not

able to get together the necessary resources for the campaign. As a result, it was impossible for them to show how much of the money would actually have been used in the fall drive.

Defendants, now appellants, raise numerous contentions of errors committed by the trial court. We have grouped them under three general headings: (1) The law applicable to the case; (2) Pre-trial motions; and (3) Trial errors.

II. THE LAW APPLICABLE TO THE CASE

Appellants' first set of contentions challenges the applicability of Sections 201, 206 and 209 of the LMRDA to the false vouchers and monthly statement. They assert four arguments: (1) The vouchers and monthly financial statement were not required to be retained under Sections 201 and 206; (2) the district court erred in removing the issue of whether the payments to Pellegrini and Halvonik were disbursements within the contemplation of Section 201(b); (3) the documents could not have been examined by the Government prior to the filing of the annual report because the Government's only interest in them was in checking the annual report; and (4) Section 209 is too vague to be a valid criminal statute.

All of these contentions are without merit.

The over-riding purpose of the reporting provisions of the LMRDA is to provide union members with "all the vital information necessary for them to take effective action in regulating affairs of their organization. . . ."[3] The Senate Labor Committee declared:

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3. S. Rep. 187, 86th Cong., 1st Session, p. 9 (1959).

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> A union treasury should not be managed as the private property of union officers, however well intentioned, but as a fund governed by fiduciary standards appropriate to this type of organization. The members who are the real owners of the money and property of the organization are entitled to a full accounting of all transactions involving their property.[4]

With that information in hand, the members can prevent any questionable practices and if necessary call their leaders to account through the electoral process, which is also protected under the LMRDA. 29 U.S.C. §481 et seq.

Therefore, the primary purpose of the reporting provisions of the LMRDA is to insure disclosure of financial operations of the unions to their members. Section 201(b) requires the filing of an annual report with the Secretary of Labor, which is to provide information on receipts and disbursements of any kind including the purposes of each such transaction. Section 206 further requires:

> Every person required to file any report under this subchapter shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and date from which the documents filed with the Secretary may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions. . . ."

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4. Id., at 8.

Although no particular bookkeeping system is mandated by these provisions, when they are read in light of the legislative purpose, it is clear that whatever system is adopted, it must be able to give anyone reviewing the records an accurate picture of all the financial operations the union has undertaken. *United States v. McCarthy,* 422 F.2d 160, 162-63 (2d Cir. 1970), *appeal dismissed,* 398 U.S. 946 (1970); *United States v. Haggerty,* 419 F.2d 1003, 1008 (7th Cir. 1969), *cert. denied,* 397 U.S. 1064 (1970); *Rekant v. Rabinowitz,* 194 F. Supp. 194 (E.D. Pa. 1961).

Further, if the union sees fit to institute some system which preliminarily tabulates those receipts and expenditures, for instance through a set of monthly financial statements, they, too, must be retained. Section 206 underscores Congress' intention to provide anyone auditing union books with a means to check the calculations used to arrive at the annual report. Records which "provide in sufficient detail the necessary basic information . . . from which the documents filed with the Secretary may be . . . checked for accuracy and completeness" logically include those documents which would show an auditor the preliminary summaries of calculations and accounting used to translate individual transactions into a final summary. Without the retention of such documents, a check for accuracy and completeness would become immeasurably more complex and the ability to obscure or hide improper dealings would undoubtedly increase.

Therefore, unions are required to retain: (1) accurate, contemporaneous records reflecting all union receipts and disbursements; (2) supporting documents reflecting the entry of transactions into the union's ac-

counts and their reproduction in the annual financial statement; and (3) any interim financial records that can serve to check that annual report. Applying these accounting principles to this case, there is no doubt that the vouchers and monthly statement had to be accurate and retained. As to the vouchers, there is no adequate alternative statement to record the purpose of the payment of funds to Pellegrini and Halvonik. Although later monthly statements may have accounted for the funds, the March statement, even in conjunction with the other statements, presents an inaccurate version of the union's financial operations.

At trial the defense contended that because the money was given to executive board members who were the trustees of the union's funds and was ultimately returned to the union, there was not a disbursement within the contemplation of the LMRDA. On appeal, they have argued to us that the matter should have been left completely to the jury. However, the district court properly instructed the jury that if they believed either the Government or the defense theories, disbursements occurred when Halvonik and Pellegrini submitted their vouchers and received checks in payment therefor. The common dictionary definition of "disburse" is to "pay out"[5] and that act can generally be characterized as the relinquishment of dominion and control over funds such that there has been a diminution in the cash assets of the payor. When the two men received their checks, the District no longer exercised control over the funds. The money came into the personal possession of the board members. The argument that the District still

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5. Webster's Third New International Dictionary 644.

continued to control the money because the board members were also trustees is specious.

The return of the money does not negate the conclusion that there was in fact a disbursement. While in the annual report, the net effect of the disbursements to Halvonik and Pellegrini and the return of the case was zero, the transactions still had to be reported. Even if we accept at face value the defendants' explanation of their actions, their attempt to set up a large cash fund separate and apart from the union's regular accounts is the type of financial transaction which we believe Congress wished disclosed.

If the records must be kept, appellants argue that the Government has no right to audit the union's books of account except to check the accuracy of the annual report after it has been filed. Since the Government took possession of the records prior to the filing of the annual statement, the taking was, therefore, improper.

This argument overlooks two significant provisions of the LMRDA. Section 601, 29 U.S.C. §521, provides the Secretary of Labor with the power to undertake investigations to determine whether any person has violated or is about to violate the reporting and disclosure provisions of the Act, and to inspect any necessary records in the course of that investigation. He need not have probable cause for that investigation, *International Bro. of Teamsters v. Wirtz,* 346 F.2d 827 (D.C. Cir. 1965) (Burger, J.); *Wirtz v. Local* 191, *Teamsters,* 218 F. Supp. 885 (D.Conn. 1963); *aff'd.* 321 F.2d 445 (2d Cir. 1963), and he is not bound by any specific time limitations as to when he can conduct his investigation.

Further, Section 210, 29 U.S.C. §440, permits the Secretary to seek appropriate civil relief whenever anyone has violated, or is about to violate, any of the reporting provisions. If he can intervene where someone is "about to violate" the provisions, Congress must have contemplated the Secretary's action prior to the filing of inaccurate reports which would violate the Act. Such civil actions are viable only if the Secretary can show that there is likely to be some inaccuracy in the statements, and the only way he can sustain that burden is by an investigation of the records before the reports are filed.

Accepting appellants' argument would lead to a result diametrically opposed to Congress' purpose to assure financial integrity in unions. Appellants and the Government disagree whether *Local 1419, ILA v. Smith,* 301 F.2d 791 (5th Cir. 1962), held that union members could seek their organization's financial records under Section 201(c) for a period which had as yet to be included in a report to the Secretary. We believe that the facts of that case support our view that when a union member has sufficient cause to require a union to open its books for inspection under Section 201(c), he is not restricted to only such records as precede its last annual report. The desire of the Senate Labor Committee report to stop all questionable financial practices commands no less.

The argument of the appellants lead to the illogical and unsound conclusion that so long as the annual report is accurate, there is no impropriety under the LMRDA if the interim records of its financial operations are false and misleading. Such bookkeeping procedures

would be intolerable under any sound system of accounting.

Finally, appellants claim that the standard set forth in Section 209 is too vague to be a valid criminal statute under *United States v. Harriss,* 347 U.S. 612, 618-19 (1954), because there is inadequate notice as to which documents are covered by the section. Section 201(b) requires that the annual report and the underlying information give a detailed account of the unions financial operations that can be checked for completeness and accuracy. To supplement that directive, Section 206 specifically provides that various records, including receipts, vouchers and worksheets, must be retained. Finally, Section 209 requires that no false statement or omission be made on any of those records. When read together, we agree with the 7th Circuit, *United States v. Haggerty,* supra, at 1007, that the sections provide a readily ascertainable standard of conduct that clearly delineates the proscribed activity. The statute is neither overly broad nor vague and gives fair notice of its prohibitions.

Appellants raise a further point that relates to the applicability of the law to their actions. They contend that the standard of wilfulness required for a violation of Section 209 is action done with evil intent or a bad motive. They urge that it was error for the district court to charge the jury that it was sufficient for the appellants to have acted in reckless disregard of the law.

While wilfulness, when employed in a criminal statute, generally means an act done with bad purpose,

it "is also employed to characterize a thing done without ground for believing it is lawful, [citation omitted] or conduct marked by careless disregard whether or not one has the right so to act [citation omitted]. . . ." *United States v. Murdock,* 290 U.S. 389, 394-95 (1933). To determine the meaning of the word, it is appropriate to resort to the context in which it is used. Id. The LMRDA imposes serious fiduciary responsibilities on union leaders. They must take the utmost care in their stewardship of their members' funds. Section 501 of the LMRDA, 29 U.S.C. §501. *Sabolsky v. Budzanoski,* No. 71-1083 (3d Cir. 1972); *Johnson v. Nelson,* 325 F.2d 646 (8th Cir. 1963). Further, the purpose of the LMRDA is not just to prevent embezzlement and fraud; as we have noted, it is to provide information for the members so that they can control their leaders. Therefore, even when false statements or omissions are not elements of schemes to defraud, they obstruct legitimate goals of the LMRDA. However, the elimination of a requirement of evil intent or bad purpose will not operate as a trap for the unwary. There can be no basis for asserting a lawful purpose for the knowing entry of deceptive statements or the omission of accurate ones in books of account. Knowledge of false statements or misrepresentations of material facts done in reckless disregard of the law is sufficiently culpable conduct to merit punishment under Section 209. *United States v. Haggerty,* supra, at 1008-09. *cf. United States v. Sarantos,* 455 F.2d 877, 881-82 (2d Cir. 1972); *Brown v. Bullock,* 294 F.2d 415, 420 (2d Cir. 1961).

Appendix "D."

III. PRETRIAL MOTIONS

Appellants asked for severance of their trials under F.R. Crim. P. 14 on the ground that they feared the introduction of sections of each other's grand jury testimony which would be prejudicial to their own defenses. The trial court denied the severance. Budzanoski now contends that the use of Seddon's testimony for impeachment prejudiced him because of its references to him, and Seddon argues that he was prejudiced because most of the testimony at trial concerned Budzanoski. Both assert that they were prejudiced in examination because the trial judge refused to permit one counsel to repeat questions already asked by the other.

The excerpts from the grand jury testimony were not of the same character as those involved in *Bruton v. United States,* 391 U.S. 123 (1968). There, the Supreme Court held that, in spite of a general preference for joint trials of co-defendants charged with the same offense, a severance was required when the co-defendant's confession directly inculpated the defendant. The admission was prejudicial because the defendant could not confront the co-defendant who had not taken the stand.

By contrast with *Bruton,* supra, or *Nelson v. O'Neil,* 402 U. S. 622 (1971), in which the Supreme Court approved the joint trial of defendants, the impeachment testimony in this case is innocuous. The use of Seddon's grand jury statements elicited little information about Budzanoski, and nothing more damaging than a statement that he was in fact the director of the District. Further, when Seddon was cross-examined, counsel for Budzanoski made no objection to the specific

questions. He also had the opportunity, unlike *Bruton,* to confront Seddon with the grand jury statements but he did not.

Counsel for both defendants participated fully at trial. The trial judge merely asked them not to repeat questions asked previously by the other counsel. That ruling was well within his discretion. It neither circumscribed counsel unfairly nor invalidated their joint trial.

On this record, we can find no prejudice resulting from the joint trial of the defendants.

Appellants next assert that they should have been granted a change of venue or a delay in trial, because of articles published in the Pittsburgh newspapers before the trial which detailed the various legal problems facing the United Mine Workers and President Boyle. In response to this situation, the trial judge conducted extensive *voir dire* of the panelists. The defense raised no objections to the panel selected. During trial, additional articles about the union appeared and one of defense counsel asked for a mistrial. The trial judge responded by ascertaining from the jury, which had not been sequestered, whether they had read the articles. They indicated that they had not. He thereupon instructed them not to read or listen to anything about the case in the news media.

These prophylactic measures and the lack of any demonstrated prejudice in newspaper articles or community feeling differentiate these facts from the prejudicial situations in cases such as *Sheppard v. Maxwell,* 384 U.S. 333 (1966), and *Irvin v. Doud,* 366 U.S. 717 (1961). The articles in the Pittsburgh cases do not

accuse the appellants of having perpetrated the crimes of which they were accused, although they broadly suggest possible financial irregularities in the union. Most of the publicity mentioned in the record is directed at President Boyle and not at appellants. Appellants have not shown that the amount or the tone of adverse publicity was prejudicial.

In addition, the trial judge was most solicitous of appellants' requests for a careful screening of the jury panel. His instruction to the jury comported to the cautionary instruction contained in *ABA Standards, Fair Trial and Free Press,* § 3.5, to mitigate the effect of potential media influence on the jury. All of these factors strongly support our conclusion that it was appropriate for the trial judge to refuse the motion for mistrial and the attendant requests for change of venue or delay of trial. *United States v. Addonizio,* 451 F.2d 49, 61 (3d Cir. 1971), *cert. denied,* 40 L.W. 3395 (2/22/72).

Appellants further argue that they were unduly prejudiced by the denial of their pre-trial motion for discovery of the testimony of the four unindicted coconspirators at the grand juries convened in Washington, D.C. and Pittsburgh, Pennsylvania, as well as the complete transcript of the Pittsburgh grand jury proceeding. The request was denied in a thoughtful memorandum decision by Judge Miller.

We agree with the decision he reached. Since the Supreme Court's decision in *Dennis v. United States,* 384 U.S. 855 (1966), there has been a liberalization in the discovery of grand jury testimony. This trend culminated in the passage of Section 102 of the Organized

Crime Control Act of 1970, P.L. 91-452, 84 STAT. 922, which amended the Jencks Act, 18 U.S.C. §3500(e) to provide for the disclosure of grand jury testimony of a witness after he has testified. *United States v. Farries,* 328 F. Supp. 1034, 1037 (M.D. Pa. 1971), aff'd No. 71-1608 (3d Cir. 1972). However, the statutory change did not affect pre-trial discovery of such testimony. It is still governed by the provisions of F.R. Crim. P. 6(e), which permit discovery "preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."[6] Therefore, there may be pre-trial discovery of

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6. It has been argued that Section 102 has limited pre-trial discovery of grand jury testimony. That position is based on the purported effect of the amendment on subsection (a) of the Jencks Act, 18 U.S.C. §3500 (a) and on F.R. Crim. P. 16 (b). However, we do not believe that either provision was affected by the amendment. Section 3500 (a) bars the disclosure of any statement it covers until the witness has testified at trial. But the amendment worked by Section 102 changes the definition of the word "statement" to include grand jury testimony only with regard to subsections (b), (c) and (d). F.R. Crim. P. 16 (b) "does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500 [the Jencks Act]." A witness' grand jury testimony does not fall into either general category. *But see,* United States v. Hughes, 413 F.2d 1244, 1255 (5th Cir. 1969), *vacated as moot sub nom* United States v. Gifford-Hill-American, 397 U.S. 93 (1970).

the testimony of a witness when it relates to the dismissal of the indictment. *United States v. Hughes,* 413 F.2d 1244 (5th Cir. 1969), vacated as moot sub nom *United States v. Gifford-Hill-American,* 397 U.S. 93 (1970); *United States v. Wolfson,* 294 F. Supp. 267, 271 (D. Del. 1968), or upon a showing of substantial likelihood of gross or prejudicial irregularities in the conduct of the grand jury. *United States v. Politi,* 334 F. Supp. 1318, 1322 (S.D.N.Y. 1971); *United States v. Dioguardi,* 332 F. Supp. 7, 20 (S.D.N.Y. 1971). See generally, 8 *Moore's Federal Practice* ¶6.05. Further, mere speculation that such improprieties may have occurred will not suffice to support that required showing. *cf. United States v. Wolfson,* supra, at 271.

The appellants' request for pre-trial discovery did not fall within the foregoing limitations. We do not decide here whether there are other situations where particularized need for such testimony in a pre-trial context might be demonstrated. We are satisfied that in this instance the defendants have failed to evince a sufficient showing before the district court for the transcripts they desired.

IV. TRIAL ERRORS

Appellants finally contend that it was error for the trial judge to permit Leon Yablonski to impeach defense witness and co-conspirator Francis McCallister with regard to a conversation in which McCallister supposedly admitted to Leon and Jock Yablonski that the money was being drained off to support Boyle's candidacy. On direct examination, McCallister testified that the purpose of the fund was for the organizing campaign in the fall, and the Government attempted to question that

assertion on cross-examination. McCallister admitted having met with the Yablonskis but denied having made the statement. On rebuttal, the Government called Leon Yablonski who stated that McCallister had made the admission. Appellants contend the statement was collateral to the proceedings, foreclosing any further inquiry into the subject after McCallister had denied making the statement.

They misapprehend the situation. A matter is collateral when it cannot reasonably be considered crucial or material to the issues on trial. *Berry v. Monongahela Connecting R. Co.*, 397 F.2d 181 (3d Cir. 1968). The issue of the purpose of the cash fund was obviously critical in this case and the trial judge properly permitted impeachment on the question. The defense was not helpless. They could and did recall McCallister, who reaffirmed his prior statement. The matter properly went to the jury in that posture.

Appellants also contend that they were denied a fair trial by the trial judge's persistent and improper interjections into the examination of witnesses, his harassment of defense counsel, and his demonstration of hostility to the appellants and their counsel. The trial of this case was lengthy, complicated, and vigorously contested. Each of the appellants were represented by separate and experienced counsel. Excessive zeal often pervaded the presentation of their cases and carried them to the outer limits of permissible advocacy. It required frequent intervention by the trial judge to maintain control of the trial and expedite its presentation.

Appendix "D."

In assessing the role of the trial judge, we wrote in *Cromling v. Pittsburgh and Lake Erie R.R. Co.*, 327 F.2d 142, 151-52 (3d Cir. 1963), that:

> It is axiomatic that [his] function . . . in a federal court is much more than that of a mere arbitrator to rule upon objections and to instruct the jury. 'It is his function to conduct the trial in an orderly way with a view to eliciting the truth and to attaining justice between the parties.' *Knapp v. Kinsey*, 232 F.2d 458, 466 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956). To this end it has been stated that '[i]t is his duty to see that the issues are not obscured and that the testimony is not misunderstood.' Ibid.

Accord, Heron v. Heron, 393 F.2d 652, 656 (3d Cir. 1968). A careful review of the record reveals that the trial judge was faithful to this command. He presided in an impartial, judicious and fair manner, designed to elicit truth, clarify issues, and maintain the dignity and order of a federal court.

We have reviewed all of appellants' numerous other assignments of error and find that none of them have merit.

The judgments of conviction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "E"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-2030/71-2031

UNITED STATES OF AMERICA
vs.
MICHAEL BUDZANOSKI
JOHN SEDDON,
MICHAEL BUDZANOSKI, Appellant in No. 71-2030
JOHN SEDDON, Appellant in No. 71-2031
(D. C. Criminal No. 70-216)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ROSENN and ROSEN, *Circuit Judges* and
VAN ARTSDALEN, *District Judge*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed October 6, 1971, be, and the same are hereby affirmed.

ATTEST:
THOMAS P. PIERCE
Clerk

June 12, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-236

MICHAEL BUDZANOSKI and JOHN SEDDON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners, the president and the secretary-treasurer of District 5, United Mine Workers of America, were convicted of conspiring to cause and of willfully causing false entries to be made in the books and records of District 5 on three separate occasions, in violation of 29 U.S.C. 439(c). They were given consecu-

tive sentences of one year's probation on the conspiracy count and on each of the three substantive counts.[1] Petitioners were each fined $500 on the conspiracy count and directed to pay the costs of prosecution.

The government's evidence showed that members of the district executive board, at petitioners' direction, prepared false vouchers indicating that they had expended their own funds to avert wildcat strikes. They returned the "reimbursements" which they received to petitioners, who put the money in a secret fund intended for use during the upcoming United Mine Workers Union presidential election campaign of W. A. "Tony" Boyle. The three substantive counts of the indictment were based on two of the false vouchers and a false entry in the executive board's monthly financial report reflecting expenditures in accordance with the false vouchers.

Petitioners assert five separate grounds for granting the writ based upon alleged errors of the trial court in charging the jury and in admitting certain evidence. The detailed opinion of the court of appeals fully and properly addresses most of the contentions petitioners raise in this Court, and we rely primarily on that opinion. We add some brief comments, however.

1*a*. Petitioners allege that the district court erroneously charged the jury that they could be found

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[1] Title 29 U.S.C. 439(c) is a misdemeanor statute. Accordingly a conspiracy to violate 29 U.S.C. 439(c) is treated as a misdemeanor (18 U.S.C. 371).

guilty of willfully making false entries in the books and records of District 5, United Mine Workers of America, if they knew the entries were false and were "conscious of the fact that what * * * they were doing was contrary to law" or were "acting wholly in disregard of what the law may provide * * * without making a reasonable effort to determine whether the plan pursued was contrary to law" (Pet. 17).

Petitioners argue that an act "willfully" done is one which is motivated by a specific wrongful purpose, and that the jury was improperly permitted to find them guilty for acts which may only have been negligent. The portion of the charge to which objection is now made was taken from petitioners' request to charge (Pet. 15, 18). Under these circumstances, petitioners may not assert this issue on appeal. In any event the court of appeals thoroughly considered petitioners' contention and properly rejected it in its opinion upon which we rely (Pet. App. 38a-39a).

Contrary to petitioners' contention (Pet. 19), there is no conflict among the courts of appeals with respect to the meaning of the term "willfully" in 29 U.S.C. 439(c).[2] Moreover, petitioners' reliance on the

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[2] *United States* v. *Haggerty*, 419 F. 2d 1003 (C.A. 7), certiorari denied, 397 U.S. 1064, cited by petitioners, involved the issue whether, despite a deliberate act of concealment, the statute had not been violated because the funds were ultimately to be spent for union purposes. In rejecting this defense the court held (419 F. 2d at 1008) that "making of * * * [a] false entry is not rendered innocent by the expectation that the union will eventually ratify the disbursement and make further concealment unnecessary." The defense which

construction of the term in other statutes ignores this Court's oft-stated direction that the meaning of the term is dependent upon the context in which it is used and upon the intent of Congress in a particular statute. *United States* v. *Murdock*, 290 U.S. 389, 394-95; *Spies* v. *United States*, 317 U.S. 492, 497; *Screws* v. *United States*, 325 U.S. 91, 101. Cases construing other statutes are, therefore, of little significance here.

b. Petitioners also make a related claim that they had "tried their cases and prepared their summations to the jury" (Pet. 28-29) relying on the trial court's preliminary instruction to the jury, at the start of the case, that "[w]illfully means with a bad purpose" (Pet. 14). The claim of "surprise" and resulting prejudice is belied by their request to charge which was adopted by the trial judge.[3]

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the court of appeals rejected in *Haggerty* is strikingly similar to that asserted here by the petitioners (Pet. 7-8). *United States* v. *Spingola*, Nos. 69-CR-453, 69-CR-454 (C.A. 7), decided June 12, 1972, is likewise inapposite here. The case involved the provisions of the Landrum-Griffin Act dealing with the willful failure to file annual reports pursuant to 28 U.S.C. 439(a) and 439(d). The court of appeals held that the statute did not make criminal a negligent failure to file. The court of appeals here did not hold that petitioners could be convicted for negligently making false entries. The charge here was concerned with the issue of what, in addition to a "knowing" falsehood, must be shown to make the act "willful."

[3] Petitioners' claim that the trial judge improperly interrupted "counsel on several occasions during their closing [argument] and prohibit[ed] them from arguing to the jury from the statute" is without merit. The trial court interrupted only to ask that counsel not repeat the preliminary charge which the court intended to expand upon. The judge did not

2. The trial court did not err, as petitioners assert (Pet. 25), in failing to advise the jury of the employment disability which petitioners faced as a consequence of conviction. It is hornbook law that, except where a statute requires a jury to determine the sentence, the penalties and other consequences of a conviction are of no concern to a jury. See Mathes & Devitt, *Federal Jury Practice and Instructions* (1965), § 15.07, and cases cited.

3. The admission of evidence showing the motive for the false entries (to raise money for the upcoming election campaign) was proper (Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 404(b), 51 F.R.D. 346). The fact that it incidentally disclosed a violation of another statute did not, as petitioners claim (Pet. 25-27), result in their being tried for an offense not charged in the indictment. The court's instructions here, unlike those given in *Stirone* v. *United States*, 361 U.S. 212, required proof of the specific allegations charged in the indictment as a prerequisite to conviction.

4. Petitioners claim that the district court erred in refusing to admit into evidence the government's trial memorandum which they claim contained "admissions" which would have "required the acquittal

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interrupt when counsel told the jury "what I think 'willful' is" (Pet. 16). Petitioners' final contention on this issue—that error was committed when the court initially indicated that it would not give their requested charge and later changed his mind—is baseless.

of Petitioners" (Pet. 28). The portion of the memorandum on which they rely stated (Tr. 1722a):

> In truth, no funds had been disbursed; they had merely been transferred from the union's checking account to a cash hoard maintained by the secretary-treasurer.

Petitioners do not explain why they regard this statement as a conclusive admission. As we understand it, the argument rests on the language of 29 U.S.C. 439(c) which makes it an offense to make "a false entry in * * * any books, records, reports, or statements *required to be kept by any provision of this subchapter*" [emphasis added]. Under 29 U.S.C. 431(b) "disbursements made" by the union must be recorded as there prescribed. Petitioners' claim appears to be that if "[i]n truth, no funds had been disbursed," the records were not of the kind required to be kept by law; and, despite the false statements, they could not be prosecuted. But the portion of the pre-trial memorandum with the statement at issue, which described the transfer of the union funds from the "union's checking account to the cash hoard maintained by the secretary-treasurer," merely alluded to the proof at trial. The conclusion that "[i]n truth, no funds had been disbursed" was merely intended to indicate that the funds had not actually been spent, although they had obviously been "disbursed" from the union's treasury. Thus, the transactions were legally required to be recorded and substantiated.

In addition, the trial court properly held that any

so-called admissions in the pre-trial memorandum were not binding on the government. See *United States* v. *Santos*, 372 F. 2d 177, 180-181 (C.A. 2); *United States* v. *Tramontana*, 460 F. 2d 464, 466-467 (C.A. 2). Moreover, the pre-trial memorandum was not a formal pleading or stipulation, which is generally binding on a client (McCormick, *Evidence* (1954), p. 520) but an informal document merely intended to outline the case for the court. Cf. *Canuso* v. *City of Niagara Falls*, 3 F.R.D. 374, 376 (W.D.N.Y.). The United States Attorney indicated that he had not intended to concede that the funds at issue had not been disbursed (Tr. 1066) and the trial court properly declined to admit the document.

5. Petitioners' final claim is that the district court improperly admitted inculpatory hearsay evidence. But the testimony about which petitioners complain was the prior inconsistent statements of a defense witness placed in their factual context, and were admitted for impeachment and not to show the truth of the out-of-court conversation. Thus, the evidence was not hearsay at all.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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